

ISSUES

Respondent appeals the denial by the Administrative Law Judge of its Application for Review and Modification filed April 4, 1997.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire record and considering the arguments of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant originally suffered accidental injury on February 2, 1992, and was awarded a 15 percent permanent partial whole body impairment. Claimant continued working for respondent in Wichita, Kansas, until November 15, 1993, at which time he was laid off. Claimant filed for review and modification which was granted and claimant's award was increased to a 44 percent permanent partial disability to the body as a whole. After his layoff and after the conclusion of his review and modification action, claimant moved to Oklahoma, in search of employment. He did manage to obtain two different jobs in Oklahoma although neither job paid a wage comparable to that which he was earning with respondent.

On April 29, 1996, claimant was provided notice of recall from respondent which offered claimant a return to employment in Wichita, Kansas, at a comparable wage. As claimant was at that time living in Tulsa, Oklahoma, and had purchased property there, claimant declined the offer of employment. Respondent then filed its Application for Review and Modification contending claimant's refusal to accept the offered job was justification for a denial of additional work disability and requesting that the award be reduced to the original 15 percent functional impairment.

At oral argument, respondent argued that claimant was in violation of the policies set forth in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foult, the Kansas Court of Appeals held that the Workers Compensation Act should not be construed to award benefits to a worker who refuses a proffered job the worker has the ability to perform.

Respondent further argued that the average weekly wage from the date of accident would easily be exceeded by the job offered to claimant and, therefore, claimant had the ability to earn a comparable wage effective the day of the offer. Claimant countered respondent's argument alleging it was not reasonable to force claimant to return to Kansas after he relocated to Tulsa, Oklahoma, in search of employment. Claimant had been living in Oklahoma for nearly two years at the time the review and modification was filed by respondent.

In addition to considering Foulk, the Appeals Board must also consider the logic of Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals found that a claimant was obligated to put forth a good faith effort to find employment when claiming a work disability. The Court of Appeals held that if a good faith effort was not made on claimant's part to find appropriate employment, then the fact finder was obligated to determine an appropriate post-injury wage and apply it to the new work disability formula of K.S.A. 44-510e.

In Foulk the claimant was offered a job which was within her restrictions and which paid a comparable wage. The claimant in Foulk refused the job without justification and the Court of Appeals found this refusal violated the public policy of the Workers Compensation Act. In this instance, claimant was laid off from respondent's employment in November 1993. Claimant remained in the Wichita area until May 1995 at which time he relocated to Tulsa, Oklahoma, in search of employment. In Tulsa, Oklahoma, claimant managed to find two separate jobs although neither paid a wage comparable to that which he was earning on the date of accident. Claimant also purchased land and placed a mobile home on that land. Respondent's offer of employment came 2½ years after claimant's date of layoff. The job offer would obligate claimant to sell the land and either sell or move the mobile home in which he is living in Tulsa, Oklahoma, and relocate to Wichita, Kansas. Foulk was intended to prevent the manipulation of the workers compensation system by a claimant wrongfully refusing proffered work. In this instance, the claimant has not wrongfully manipulated the system by refusing to relocate to Wichita, Kansas, a distance of several hundred miles 2½ years after his date of layoff. The Appeals Board sees no correlation between the facts in Foulk and the facts of this case.

In Copeland, the Court of Appeals required that the claimant put forth a good faith effort to secure employment. A lack of good faith effort would obligate the trier of facts to impute a wage under K.S.A. 44-510e as amended July 1, 1993, by the Kansas Legislature. In this instance, claimant has shown a good faith effort. He remained in the Wichita area for 1½ years after his termination of employment with no proffer by the respondent of a comparable wage job. His relocation to Tulsa, Oklahoma, was for the purpose of obtaining employment, which he has done with two separate employers. His refusal to relocate back to the Wichita area stems from the fact he had relocated to and purchased property in Tulsa, Oklahoma. The Appeals Board cannot find that this claimant has acted in bad faith in refusing to return to Wichita, Kansas. If anything, claimant displayed good faith in being willing to relocate to Tulsa, Oklahoma, in search of employment. Therefore, the Appeals Board finds that the logic of Copeland does not apply to this circumstance. The Appeals Board finds, therefore, that the order of the Administrative Law Judge denying respondent's Application for Review and Modification under these circumstances was appropriate and should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Review and Modification entered by Administrative Law Judge Jon L. Frobish, dated August 6, 1997, should be, and is hereby, affirmed.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Deposition Services	
Transcript of Review & Modification Hearing	\$149.10

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Frederick L. Haag, Wichita, KS
Cortland Q. Clotfelter, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director